No. 16394

# United States
# COURT OF APPEALS
## for the Ninth Circuit

MAYFLOWER INSURANCE EXCHANGE,
*Appellant,*

vs.

ROBERT DEAN GILMONT, ROSE MARIE GILMONT and RONALD A. WATSON, Guardian ad Litem for Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor and Norman I. Gilmont, a minor,
*Appellees.*

## BRIEF OF APPELLEES GILMONT

*Appeal from the United States District Court for the District of Oregon.*

HONORABLE WILLIAM G. EAST, District Judge.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8-59

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No. 16394

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## BRIEF OF APPELLEES GILMONT

*Appeal from the United States District Court for the District of Oregon.*

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## JURISDICTION

Appellant commenced this action under the Federal Declaratory Judgment Act (28 U.S.C.A. 2201, 2202) to determine the rights and liabilities of the insurance company, the insured, and injured parties under an automobile public liability insurance policy.

Jurisdiction of the District Court was based on diversity of citizenship under the provisions of 28 U.S.C.A. 1332. Appellant is an unincorporated insurance association organized under the laws of the State of Washington. Defendant Arthur Allen McKinzie, the insured, is a citizen of the State of California, and defendants Gilmont, the injured parties, are citizens of the State of Oregon. The amount in controversy, exclusive of interest and costs, exceeds $3,000.00.

Appellant has appealed from a final judgment of the United States District Court for the District of Oregon and this Court acquired jurisdiction under the provisions of 28 U.S.C.A. 1291, 1294.

## OPINION BELOW

The judgment of the District Court was rendered without opinion upon the verdict of the jury. The following opinion was rendered by the District Court in connection with a proposed order of default against defendant Arthur Allen McKinzie which was tendered to the Court by the appellant after the jury's verdict but before entry of the judgment order (Tr. 50-52):

### LETTER OPINION

Gentlemen:

This will acknowledge the letter of Mr. Kennedy under date of November 24 enclosing a form of judgment order. Also the letter of Mr. Bosch under date of November 26 enclosing a proposed form of order of default as to the defendant McKinzie, and likewise Mr. Kennedy's letter under date of November 29 in

opposition to the request of Mr. Bosch in his letter of November 26.

It is my belief that pursuant to Rule 55 (b) (2) of the Federal Rules of Procedure, the plaintiff is entitled to have the Court enter an order of default against the defendant McKinzie for his failure to plead or otherwise appear in the action. At the hearing on November 21 I was under the impression that the Clerk could enter the default, but, inasmuch as the claim of the plaintiff was not liquidated, I feel that subsection (2) of Rule 55 applies. This Court is of the opinion that the defendant McKinzie, by his failure to appear in this cause, can in nowise defeat what legal claims the defendants Gilmont might have against the plaintiff by reason of the plaintiff's insurance policy issued to the defendant McKinzie and which the Court held to have been in full force and effect as of the date of the accident from which arose the claims of the defendants Gilmont against the defendant McKinzie and his insurer in the event of a judgment upon the merits against the defendant McKinzie.

This Court feels that the plaintiff is entitled to have an order of default against the defendant McKinzie in the form submitted in Mr. Bosch's letter under date of November 26. Therefore, the order has been entered as of November 21 in conformity with the Court's oral statement.

This Court feels that this order of default is in nowise an order constituting a determination of the merits of the alleged cause of action of the defendants

Gilmont against the defendant McKinzie and is merely a determination of the status of the plaintiff's policy of insurance issued to the defendant McKinzie as of the times and dates involved in the litigation before this Court.

Accordingly, the judgment order as submitted in Mr. Kennedy's letter under date of November 24 is entered as of this date of December 2.

## STATUTES INVOLVED

28 U.S.C.A. 2201—

> "Creation of remedy—In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Federal Rules of Civil Procedure, Rule 55, 28 U.S.C.A.—

> "Rule 55. Default
>
> "(b) Judgment. Judgment by default may be entered as follows:
>
> "(1) . . .
>
> "(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has

appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

ORS 736.305—

*"Construction of insurance contracts; incorporation of application in policy.*

"(1) Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made a part of the insurance contract. In that case, if the company delivers a copy of such application to the assured, thereupon such application shall become a part of the insurance contract. If the application is not so delivered to the assured, it shall not be made a part of the insurance contract.

"(2) Matters stated in an application shall be deemed to be representations and not warranties.

"(3) This section does not apply to fidelity and surety contracts."

ORS 482.470—

*"Length of suspension; surrender and return of license.* (1) Except as provided in subsection (2) of ORS 482.430 and in ORS 482.440, the department shall not suspend a license for a period of more than one year."

## STATEMENT OF THE CASE

This action was commenced by appellant, Mayflower Insurance Exchange, hereinafter referred to as "Mayflower" under the Federal Declaratory Judgment Act against its insured, Arthur Allen McKinzie, hereinafter referred to as "McKinzie" and against injured members of the Gilmont family, hereinafter referred to as "Gilmonts" to declare the rights and liabilities of the parties and to rescind the coverage provided by an automobile public liability insurance policy.

On April 16, 1957, McKinzie purchased an automobile in Portland, Oregon and was referred by the owner of the used car lot to the local agent for Mayflower. The owner of the used car lot made arrangements for the appointment and furnished some information to the agent (Tr. 102, 104, 125).

At approximately 6:00 p.m. on the same date McKinzie signed an application for insurance which was prepared by the Mayflower agent (Ex. 1, Tr 103-104, 137). A policy of public liability insurance was subsequently issued to McKinzie as of the date of the application (Ex. 3).

On June 8, 1957 McKinzie collided with an automobile operated by Gilmont which resulted in property damages and personal injuries to all of the Gilmonts (Tr. 20). Mayflower immediately commenced an investigation in Toledo, Oregon, where the accident occurred and also contacted McKinzie's landlady in Portland (Tr. 216-221).

On July 2, 1957 Mayflower requested an abstract of driving record of McKinzie from the Oregon Department of Motor Vehicles but failed to enclose the required fee of $1.00 (Ex. 24, Tr. 228-229). The abstract of driving record was received by Mayflower on September 4, 1957 (Ex. 30, Tr. 236). Between July 2, 1957 and September 4, 1957 there was a considerable amount of correspondence between the Oregon Department of Motor Vehicles and the Home Office and Portland Office of Mayflower regarding the driving record and the necessity of forwarding a fee of $1.00 (Ex. 25, 26, 27, 28, 29; Tr. 228-236).

The insurance adjuster for Mayflower contacted McKinzie at the Veterans Administration Hospital in Portland, Oregon on July 26, 1957 and obtained a statement from him and a proof of loss and release for property damages (Tr. 221-222).

On September 23, 1957 Mayflower wrote to McKinzie at the Veterans Hospital and advised him that they were rescinding coverage under the insurance policy because their investigation disclosed that on February 16, 1957 his driver's license had been suspended for an additional year and that this suspension was still in effect on April 16, 1957 (the date of the application) and because their investigation had disclosed that he had been convicted on February 14, 1956 of the traffic offense of "no muffler" (Ex. 8, Tr. 249-251). This action for declaratory relief was filed on October 1, 1957 (Tr. 15).

A pre-trial order was entered in this case (Tr. 18-36). Mayflower contended that the insurance policy was void because certain alleged false and fraudulent representations had been made in the application for insurance including matters in addition to those set forth in the letter of rescission dated September 23, 1957. Gilmonts denied the contentions of fraud and set forth affirmative defenses of negligence, waiver, estoppel, laches and further contended that Mayflower had affirmed the insurance contract by their acts and conduct.

The case was tried to a jury. After Mayflower had rested it objected to any evidence as to the affirmative defenses set forth in the pre-trial order (Tr. 180-181). After considerable discussion between court and counsel (Tr. 181-212), the court withdrew the defenses of waiver and estoppel (Tr. 198) and thereafter Gilmonts were prevented from offering any evidence in connection with these defenses.

The case was submitted to the jury on appropriate instructions that Mayflower had the burden to prove the elements of fraud. The question of negligence on the part of Mayflower was submitted to the jury and all of the other affirmative defenses were withdrawn by the court.

McKinzie did not appear in person or by counsel. He was being represented by the attorneys for Mayflower under a reservation of rights agreement in the personal injury litigation which had been filed against him in the State court by Gilmonts (Tr. 36, 37, 38, 39, 18).

Mayflower did not apply for an order of default against McKinzie until after the trial. During the trial the court inquired as to the status of the record in connection with McKinzie and asked counsel for Mayflower whether it was in a position to ask for a default against him. Counsel for Mayflower stated that they were a little uncertain of it (Tr. 200-202).

The verdict of the jury in favor of Gilmonts was returned on June 20, 1958, and was filed on the same date (Tr. 44). Entry of the judgment was delayed at the court's request until determination of Mayflower's motion for a judgment notwithstanding the verdict and for a new trial. This motion was denied on November 3, 1958 (Tr. 47).

On or about November 21, 1958 Mayflower applied for an order of default against McKinzie. The District Court held that Mayflower was entitled to an order of default but that the default could not defeat the legal claims of the Gilmonts against Mayflower under the insurance policy (Br. 2; Tr. 50-52). The order of default was entered as of November 21, 1958 (Tr. 49-50). The judgment order was entered on December 2, 1958 (Tr. 52-56).

The judgment order adjudges that the insurance policy was valid and in full force and effect; that Mayflower was and is under a duty and obligation to defend McKinzie; that Mayflower is under a duty and obligation to pay any judgment that may be entered against McKinzie and that Gilmonts are not restrained and were entitled to institute proceedings against Mayflower

for the recovery of any judgment that may be obtained against McKinzie (Tr. 52-56).

Mayflower has appealed contending that it was entitled to a directed verdict, a judgment notwithstanding the verdict and/or a new trial. Mayflower contends that it conclusively proved all of the elements of fraud and there was no issue to be submitted to the jury. It further contends that it was error to submit the question of Mayflower's negligence to the jury.

## QUESTIONS PRESENTED

We believe that two primary questions are involved in this appeal. They are (1) Whether plaintiff Mayflower was entitled to a directed verdict in a jury trial when it had the burden to prove that it was entitled to rescind its obligations under an automobile insurance policy on the grounds that fraudulent representations had been made by the insured in the application and (2) Whether it was proper to instruct the jury that negligence on the part of the agent who prepared the application would constitute a defense to the action for rescission.

## SUMMARY OF ARGUMENT

1. An issue of fact was presented as to whether Mayflower sustained its burden of proof as to the elements of fraud sufficient to justify rescission of an insurance contract.

2. The evidence was sufficient to justify submission to the jury of the question of whether Mayflower was careless and negligent in preparing and taking the application of insurance from McKinzie.

## ARGUMENT

### I

### Mayflower Did Not Conclusively Prove Fraud

Mayflower has discussed some of the evidence in its brief in support of its contention that the evidence conclusively established all of the elements of fraud so that there was no issue to be submitted to the jury. Some of the evidence discussed by Mayflower was controverted or explained at the time of trial and other phases of the testimony have been presented in the light most favorable to Mayflower. In deciding whether a jury question was presented it is, of course, well established that the evidence must be considered in the light most favorable to the party who received the verdict of the jury.

Mayflower never objected to the request for a jury trial and also consented to the case being submitted to the jury on a general verdict (Tr. 268, 280). Mayflower also tried this case on the basis that it was necessary for it to prove all of the elements of actionable fraud. The District Court advised counsel that it was going to submit to the jury the elements of fraud and no exceptions or objections were taken to such instructions (Tr. 278). Gilmonts were entitled to a jury trial

and it was the exclusive province of the jury to decide this case. Dickinson v. General Accident F. & L. Assur. Corp., 147 F. (2d) 396 (CA 9, 1945).

The jurisdiction of the District Court was based on diversity of citizenship. The question of fraud, misrepresentation and rescission should be determined by the law of the State of Oregon, where this policy was issued, where the accident occurred and where this case was tried. Pacific Indemnity Co. v. McDonald, 107 F. (2d) 446 (CA 9, 1939); Dickinson v. General Accident F. & L. Assur. Corp., supra.

Matters stated in an application for insurance have been declared by the Oregon Legislature to be representations and not warranties. ORS 736.305 (2) (Br. 5). Actionable fraud has been defined by the Oregon Supreme Court in Conzelmann v. N. W. P. & D. Prod. Co., 190 Or. 332, 225 P. (2d) 757 (1950), as follows:

> "Comprehensively stated, the elements of actionable fraud consist of: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury. (citing cases)." (190 Or. at 350).

The Oregon Supreme Court has repeatedly held that an insurance policy cannot be cancelled unless it is shown that the representations pertain to material matters and have been knowingly and wilfully made by the insured with intent to deceive or defraud the insurance

company. Ward v. Queen City Ins. Co., 69 Or. 347, 138 P. 1067 (1914); Willis v. Horticultural Fire Relief, 77 Or. 621, 152 P. 259 (1915); Eaid v. National Casualty Co., 122 Or. 547, 259 P. 902 (1927); Mutual Life Ins. Co. v. Muckler, 143 Or. 327, 21 P. (2d) 804 (1933).

There can certainly be no question as to the burden of proof in this case. Fraud is never presumed. Each of the essential elements of fraud must be proved and the failure to prove any one or more is fatal to the cause of action. Conzelmann v. N. W. P. & D. Prod. Co., supra.

Having alleged fraud, the burden was on Mayflower to prove the allegations by clear and convincing evidence. Northwestern Mut. Life Ins. Co. v. Wiggins, 15 F. (2d) 646 (CA 9, 1926), cert. denied 273 U.S. 746; Belanger v. Howard, 166 Or. 408, 112 P. (2d) 1022 (1941); Baker v. Deter, 68 Or. Adv. Sh. 411, 336 P. (2d) 903 (1959).

*Evidence as to Whether Application Was Delivered to McKinzie*

Before Mayflower could rely on any statements made in the application it was necessary to prove that a copy of the application was delivered to McKinzie. ORS 736.305 (1) provides that if the application is not delivered to the assured it shall not be made a part of the insurance contract (Br. 5).

Mayflower attempted to sustain this burden of proof by introducing testimony of its witness McKinzie and testimony of its agent Snyder. On direct examination

McKinzie testified that the agent gave him a copy of the application (Tr. 122). However, on cross examination he testified that he did not remember whether the agent gave him the copy of the application or not, and he did not know whether he had a copy of the application (Tr. 126).

Mayflower's agent Snyder testified on direct examination that he gave McKinzie a copy of the application (Tr. 142). On cross-examination Snyder was impeached from his deposition where he stated that he did not remember whether he gave a copy of the application to McKinzie and that his answer was based on usual practice (Tr. 150). As a matter of fact, Snyder did not actually remember anything that occurred at the time of the application (Tr. 147-153).

This is the type of evidence which Mayflower claims was absolutely conclusive. The jury was entitled to consider whether the application was actually delivered to McKinzie. If it was not so delivered, it was not a part of the insurance contract and Mayflower was not entitled to rely on any statements which may have been included therein.

*Evidence as to Driver's License*

Mayflower advised McKinzie in its letter of rescission dated September 23, 1957 that they had been advised by the Oregon Department of Motor Vehicles that on February 16, 1957 his driver's license had been suspended for an additional year and that this suspension was still in effect on April 16, 1957 (Ex. 8).

Two motor vehicle driving records were introduced into evidence. One stated that he was suspended on February 14, 1956 for an additional year and that his driving privileges had not been subsequently reinstated (Ex. 7). The other record, bearing a later date, merely stated that he had been suspended on February 14, 1956 for an additional year and indicated that his driver's license was not suspended beyond that time (Ex. 35, Tr. 264-265).

The Oregon Motor Vehicle Department, except under certain stated conditions, cannot suspend a driver's license for a period of more than one year. ORS 482.470 (1) (Br. 5). McKinzie was eligible for an Oregon driver's license on February 14, 1957 and was eligible at the time of the application. He so testified (Tr. 113, 115). He had never applied for an Oregon driver's license at the time of the application because he was using his license from the State of California (Tr. 113-114).

McKinzie considered that he was a resident of the State of California. He was in California during 1951, returned to Oregon to work on a dam and then lived in California from 1952 to 1956 (Tr. 126). The visit to Oregon in 1956 was temporary and he planned to return to California (Tr. 126). He at all times had a California driver's license (Tr. 105, 125).

McKinzie testified that he had an Oregon driver's license in 1947 and that it expired in 1950 or 1951 because he was in California and also out of the country (Tr. 106-107). He testified repeatedly that his license was never revoked or suspended because he never had

a license in Oregon and had never received one after the time that it expired (Tr. 105-106, 114-115).

He was allowed to read the Motor Vehicle record from the State of Oregon and he testified that it was not correct (Tr. 108). He testified that he was never notified that his license was suspended in 1947 and he stated that it was not suspended (Tr. 109-110). He testified that he was never notified that his license was suspended in 1952 for non-payment of a judgment and he did not know whether that portion of the record was correct or not (Tr. 111).

It was necessary for Mayflower to prove by clear and convincing evidence that McKinzie knew that the statements were false and that he made them wilfully with the intention to deceive or defraud the insurance company. Ward v. Queen City Ins. Co., 69 Or. 347, 138 P. 1067 (1914); Willis v. Horticultural Fire Relief, 77 Or. 621, 152 P. 259 (1915); Eaid v. National Casualty Co., 122 Or. 547, 259 P. 902 (1927); Mutual Life Ins. Co. v. Muckler, 143 Or. 327, 21 P. (2d) 804 (1933).

In the Eaid case, supra, the insurance company contended that the insured had made false and fraudulent misrepresentations in his application as to his business and occupation and also as to his monthly income. The court referred to the Oregon statute which provides that statements in an application for insurance shall be deemed representations, and stated:

> "The matter stated in the application pertaining to occupation and income being deemed representa-

> tions and not warranties, in order to affect the policy, must be as to material matters and wilfully made with intent to deceive: (citing cases)." 122 Or. at 555).

The Oregon Court further held that certain evidence was competent and admissible to show that statements in the application were made in good faith and with no intent to deceive or defraud the company.

Neilsen v. Mutual Service Casualty Insurance Co., 243 Minn. 246, 67 N.W. (2d) 457 (1954) was quite similar to the present case. In that case, the application for automobile insurance stated that none of the drivers listed in the application had ever been arrested for drunken or reckless driving or had his driver's license suspended or revoked. It was admitted that the driver's license of one of the drivers had twice been revoked for reckless driving. The insured had actual knowledge of one of the revocations. The court held that it was a jury question. The court stated:

> "In the light of the evidence the question of whether or not the misrepresentation was made with intent to deceive or defraud clearly was for the jury. We cannot hold that a misrepresentation was made with intent to deceive and defraud unless the evidence is conclusive." (67 N.W. (2d) at 462).

The evidence in this case was far from conclusive that McKinzie had knowledge or understanding of the claimed facts or that he intended to deceive or defraud the insurance company. He considered that he was a resident of the State of California. He was driving with a California driver's license and he did not consider that he had any license to be revoked or sus-

pended in the State of Oregon. He further denied that the driving record introduced by Mayflower was correct.

The jury was entitled to consider these circumstances in evaluating his knowledge and understanding and whether he intended to deceive or defraud the insurance company.

*Evidence as to Driving Charges, Citations or Fines in Past Three Years*

McKinzie testified that he only had one ticket three years prior to the time that he made the application. The ticket was received in Bell, California, and apparently it was for drag-racing on a motorcycle (Tr. 116-118).

He was asked on direct examination why he did not tell the agent about this ticket when he made his application and he testified "They didn't ask me if I ever had any tickets for speeding or anything." (Tr. 117). He testified that he might have had some tickets in Los Angeles for motorcycles but he considered that a motorcycle was different than an automobile (Tr. 115-116).

The charge of "no muffler" involved his brother-in-law's truck. McKinzie testified that he was driving this truck because his brother-in-law was sick on that particular day (Tr. 131). He testified that he did not have to appear for this charge as it was not his truck and all that his brother-in-law had to do was to show that the truck had been repaired (Tr. 118). He further testified that he did not have to pay any fine in connec-

tion with this charge (Tr. 118). This particular offense would not even appear to be a "driving charge, citation or fine," within the meaning of the application.

This testimony did not conclusively show that McKinzie had knowledge that he was answering the question falsely or that he had any intention to deceive or defraud. More important, a question of fact was certainly presented as to the materiality of these matters.

*Evidence as to Other Claimed Misrepresentations*

Mayflower contends that McKinzie made a fraudulent misrepresentation in stating in the application that he had not been involved in any automobile accident in the past three years (App. Br. 16, 34). There is absolutely no evidence that McKinzie had any automobile accident within three years prior to the date of the application. McKinzie did not have an automobile accident during this period of time. This question in the application was answered correctly (Tr. 119).

Mayflower further contends that McKinzie falsely and fraudulently stated that he did not have any previous insurers (Tr. 12, 16, 19). McKinzie testified that he previously had insurance and that the word "None" was inserted after question No. 2 in the application because he did not recall the names of the companies (Tr. 119-120). He could not even recall the names of the insurance companies at the time of his deposition (Tr. 121).

The mere fact that this question was answered incorrectly is not conclusive proof of fraud. It is not conclusive proof that the statement was made wilfully with intention to deceive or defraud the insurance company.

Moreover, how could this possibly be conclusive evidence of materiality. There is no evidence that this affected the risk. As a matter of fact, McKinzie had never been refused insurance and he never had a policy of automobile insurance cancelled or refused (Tr. 119).

*Evidence Presented Jury Question*

Appellant's brief states that this case is unique because all of the evidence which the jury was entitled to consider was presented by appellant's witnesses and exhibits and was introduced on appellant's case in chief and because the facts relevant to the issues submitted to the jury were undisputed as appellees introduced no evidence which would tend to contradict, discredit or weaken this evidence (App. Br. 9).

Mayflower has taken it upon itself to decide what evidence the jury was entitled to consider and what facts were relevant to the issues submitted to the jury. It was the province of the jury to determine the facts. Mayflower has conveniently ignored the possibility that the jury may not have believed its witnesses.

We agree with counsel that this case is unique, not for the reasons assigned by appellant, but because it involves a case where a plaintiff charges fraud, introduces some evidence as to the elements of the fraud and then

claims that its evidence is conclusive upon the jury. The mere statement of such a proposition demonstrates its fallacy.

Mayflower further argues that the defense in this case was grounded upon theories of estoppel, waiver and laches (App. Br. 14-15). This is not correct. The principal defense in this case was a general denial of fraud and this is apparent by the pleadings and by the pre-trial order.

Mayflower further intimates in its brief that Gilmonts in some way waived their general denial in their opening statement to the jury (App. Br. 14). This again is incorrect. Counsel for Gilmonts stated in the opening statement, "We don't believe that Mr. McKinzie was guilty of any fraudulent conduct at the time he took out the insurance and that, of course, you will have to determine from the facts which are presented to you." (Tr. 84). Throughout this case Gilmonts denied that McKinzie was guilty of any fraudulent conduct. Practically all of the requested instructions were based on the issue of fraud.

Gilmonts had no duty to disprove any allegations made by Mayflower. Mayflower was the plaintiff. Mayflower was the one who was claiming fraud and it was the party who had the burden of proving it. It is obvious that Gilmonts could have immediately rested after plaintiff's case and a question for the jury would still have been presented.

Mayflower has cited a number of cases in support of its argument that the evidence conclusively proved

fraud as a matter of law. We do not believe that these cases are applicable. All of the cases cited by Mayflower, except National Life and Accident Insurance Co. v. Gorey, 249 F. (2d) 388 (CA 9, 1957), were cases tried to the court without a jury. Those cases merely stand for the proposition that there was sufficient evidence to sustain the findings of the court.

The only case cited by Mayflower which involved a jury trial is National Life and Accident Insurance Co. v. Gorey, supra. In that case an extensive stipulation was entered into by counsel—wherein, among other things, it was stipulated that the insurance company had relied on the application. In addition, this court applied the law of California and relied strongly on a California case.

Mayflower relies on the case of State Farm Mutual Automobile Ins. Co. v. West, 149 F. Supp. 289 (Md., 1957). That case was tried to the court without a jury and the court found the elements of fraud as a fact. It is obvious that the court was impressed with the testimony of the insurance agent and was not impressed with the insured as a witness. Compare the testimony of insurance agent Snyder in this case (Tr. 136-155).

In this type of case the question of fraud is one of fact to be tried by the jury. Eaid v. National Casualty Co., 122 Or. 547, 259 P. 902 (1927); Willis v. Horticultural Fire Relief, 77 Or. 621, 152 P. 259 (1915); Nielsen v. Mutual Service Casualty Insurance Co., 243 Minn. 246, 67 N.W. (2d) 457 (1954); Cardwell v. United States, 186 F. (2d) 382 (CA 5, 1951); Collins

v. United States, 254 F. (2d) 66 (CA 7, 1958); New York Life Ins. Co. v. Moats, 207 F. 481 (CA 9, 1913).

The Nielsen case, supra, has heretofore been discussed (Br. 17). In that case the insured knew when he signed the application that the driver's license of his son had been revoked for reckless driving. The court held that the question of whether or not the misrepresentation was made with intent to deceive or defraud was clearly for the jury.

In New York Life Ins. Co. v. Moats, supra, the medical examiner for the insurance company was required to state if there was anything which would make the risk undesirable and was generally required to advise the company as to the desirability of the risk. This court held that the character of the risk was mainly determined on the basis of the examination and the report of the doctor and not wholly upon the answers and representations of the applicant. This court held that questions of fact were presented for the jury and were properly submitted to the jury for determination. In the present case the insurance agent was similarly required on the back of the application to either recommend its acceptance or to decline it (Ex. 1).

Cardwell v. United States, supra, is quite similar to the present case. It involved an action by a beneficiary on a National Service Life Insurance policy. The Government contended that the insured had fraudulently procured the reinstatement of the policy by fraudulent representations made in the application for reinstatement. It appeared, contrary to the answers in the appli-

cation, that the insured had previously consulted two physicians. The case was tried to a jury, but at the close of all of the evidence the court held that the evidence was such as to establish all of the elements of fraud as a matter of law and directed a verdict in favor of the Government. The Court of Appeals reversed. The Court stated:

> "In order to justify a directed verdict the evidence must be such that without weighing the credibility of witnesses there can be but one reasonable conclusion as to the verdict. And to void a policy for fraud there must be present in the evidence facts showing that the insured made a false representation, (1) in reference to a material fact, (2) with knowledge of its falsity, (3) with intent to deceive, and (4) with action taken in reliance on the representation. (Citing cases). There can be no doubt as to the falsity of the representation contained in the application for reinstatement, and that action was taken by the Government in reliance thereon. But it is not every false statement that will void an insurance policy. The representation must not only have been untrue, but it must have been in reference to a material matter and knowingly made with knowledge of its falsity and with intent to deceive. And when reasonable men may differ as to whether a representation was material or whether a false answer was made with intent to deceive, those questions must be submitted to the jury. Judging the proof by these standards, we cannot say the evidence preponderates so heavily in favor of the Government as to leave no doubt about the facts or the inferences to be drawn therefrom." (186 F. (2d) at 384-385).

Mayflower had the burden to prove by clear and convincing evidence that material false and fraudulent misrepresentations were knowingly and wilfully made

by the insured with the intention to deceive the insurance company. The credibility of the witnesses was for the jury. Reasonable men could differ as to whether the elements of fraud were present. Mayflower's motion for a directed verdict was properly denied.

## II

### Failure of McKinzie to Appear Is Immaterial

In specification of error No. 3 Mayflower contends that the trial court erred in denying its motion for a new trial. One of the grounds advanced by Mayflower for a new trial was that a judgment could not be rendered in favor of appellees since they had no greater right than McKinzie, who had defaulted (App. Br. 5).

McKinzie did not file any appearance nor did he appear at the time of trial. Mayflower took his testimony by deposition and introduced portions of it at the trial on the theory that it constituted statements against interest of a *party* (Tr. 98-100). Counsel for Mayflower knowingly failed to move for an order of default at the time of trial after the court had inquired as to whether they were in a position to ask for a default against McKinzie (Tr. 200-202).

The verdict was returned on June 20, 1958 (Tr. 44). Mayflower thereafter moved for a judgment notwithstanding the verdict and for a new trial. Mayflower's motion was denied on November 3, 1958 (Tr. 47). On or about November 21, 1958 Mayflower applied to the court for an order of default against McKinzie (Tr. 49).

Rule 55 (b) (2) of the Federal Rules of Civil Procedure provides in connection with judgments by default by the court that if it is necessary to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper (Br. 4).

At the time of the application for an order of default, the court had already heard the testimony introduced at the time of trial. In addition, the court held a hearing in connection with the proposed default and rendered an opinion (Tr. 50-52; Br. 2). The court held that the failure of McKinzie to appear could in no way defeat what legal claims the defendants Gilmont might have against Mayflower by reason of the insurance policy issued to McKinzie, which the court found to have been in full force and effect as of the date of the accident.

In the pleadings and the pre-trial order Mayflower prayed that the rights of all of the parties, including McKinzie, be declared and determined. Gilmonts joined in the declaration and also prayed for a declaration of the rights of the parties (Tr. 28).

It is clear that there was an actual controversy between Mayflower and Gilmonts. In Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941), the insurance company commenced declaratory judgment proceedings against its insured and one Orteca, who was injured in an automobile accident. Orteca demurred to the complaint on the ground that it did not state a

cause of action against him. The Supreme Court held:

> "That the complaint in the instant case presents such a controversy is plain. Orteca is now seeking a judgment against the insured in an action which the latter claims is covered by the policy, and Secs. 9510-3 and 9510-4 of the Ohio Code . . . give Orteca a statutory right to proceed against petitioner by supplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition. . . . Moreover, Orteca may perform the conditions of the policy issued to the insured requiring notice of the accident, notice of suit, etc., in order to prevent lapse of the policy through failure of the insured to perform such conditions. (Citing cases)." 312 U.S. at 273).

If the jurisdiction of the court to render a declaratory judgment is properly invoked, it is the duty of the court to render a judgment declaring the rights of the respective parties litigant. Central Or. Irr. Dist. v. Deschutes County, 168 Or. 493, 124 P. (2d) 518 (1942). Even if the defendant refuses to file an answer, the court should nevertheless proceed to enter a declaration of the rights of the parties. Central Or. Irr. Dist. v. Deschutes County, supra.

Mayflower had a choice to make the Gilmonts parties to this action or to proceed solely against its insured. If the Gilmonts were joined, they would be barred by the proceedings. If they were not joined, they could not be barred by the proceedings. Having been made parties to Mayflower's case, the Gilmonts obviously had a right to defend.

## III

### Question of Negligence Properly Submitted to Jury

Mayflower contends that the District Court committed error in failing to give its requested instruction No. 2 (App. Br. 6-7). This requested instruction was properly refused as it instructed the jury to disregard the defense of negligence in determining this case. In addition, the objection to the failure of the court to give this instruction failed to properly direct the court's attention to the claimed error (App. Br. 6-7).

Mayflower contends that error was committed in instructing the jury that Mayflower would not be entitled to be relieved of its obligation under its insurance policy if it was careless and negligent in obtaining and completing the application of insurance (App. Br. 7-8).

The evidence was sufficient to submit this question to the jury. The arrangements to obtain the insurance were made by the owner of the used car lot where McKinzie had purchased his automobile. The owner of the used car lot had called the insurance agent and there was a strong inference that he had furnished considerable information to the agent (Tr. 102, 125). McKinzie testified (Tr. 104);

> "Q. Now, when you came in there did he ask you what your name was?
> A. Yes, uh-huh.
> Q. And your address?
> A. Yes.
> Q. What kind of a car it was?
> A. Uh-huh.

Q. And how much coverage you wanted?
A. Well, he had already known what the car was and Sam had already evidently told him."

Agent Snyder completely filled out the application and also placed a check mark on it indicating where McKinzie was to sign (Tr. 103, 137, 153). The back of the application required the district agent to recommend the applicant and to recommend or decline the application (Ex. 1). Agent Snyder testified that he signed his employer's name to the back of this application and that this was the ordinary and normal practice in the office (Tr. 142-143, 151-152).

The office normally closed at 6:00 P.M. (Tr. 153). The application indicates that the insurance was applied for at 6:00 P.M. (Ex. 1). McKinzie testified that he arrived at the office at 6:00 P.M. (Tr. 125). He further testified that it took about ten minutes to fill out the application (Tr. 126).

Agent Snyder was not acquainted with McKinzie (Tr. 140). He never examined the automobile (Tr. 127), although he stated on the application that he had inspected it (Ex. 1). He never asked McKinzie if he had "any tickets for any speeding or anything" (Tr. 117). He never asked him if he had a license (Tr. 127). Snyder even listed McKinzie's name incorrectly (Tr. 101).

Mayflower also at times made a credit investigation of applicants and obtained a record of the driving experience of applicants (Tr. 168-169). A driving record may be obtained from the State of Oregon for $1.00

(Tr. 169). Mayflower apparently did not make any type of investigation in this case.

The mere fact that the applicant stated that he was 40 years of age and had no previous insurer should have been sufficient to place the insurance company on notice to make further inquiry. As stated in Love v. Metropolitan Life Ins. Co., 99 F. Supp. 641 (E. D. Penn., 1951):

> "If the ambiguity of the answers was such that a reasonably prudent insurer would have undertaken a further inquiry which would have led to a disclosure of the true facts, and none was undertaken, then it is entirely equitable to find the insurer estopped from reliance on the answers given." (99 F. Supp. at 644)

Mayflower further contends that negligence of the Bucholz Agency cannot be imputed to it (App. Br. 43, 48-50). Mayflower never objected to the instructions on these grounds (App. Br. 6-8). At no time during the trial did Mayflower ever contend that its agent lacked authority to represent the insurance company and bind it by its actions.

Snyder had been employed by the Bucholz Agency as Office Manager for two years (Tr. 145). The evidence was clear that the Bucholz Agency was an authorized agent for Mayflower. On direct examination Snyder testified (Tr. 137):

> "Q. In April of 1957 were you employed by the Bucholz Insurance Agency?
>
> A. Yes, I was.
>
> Q. And was that agency an authorized representative of Mayflower Insurance Exchange?
>
> A. Yes, they were."

Mayflower attempts to support its position by citing conditions 19 and 22 of the insurance policy regarding changes in the policy and declarations of the insured (App. Br. 49-50). There has been no attempt to change or waive any conditions of the insurance policy. These particular conditions are immaterial in connection with any question of negligence on the part of the agent. Williams v. Pacific States Fire Ins. Co., 120 Or. 1, 251 P. 258 (1926).

In Hardwick v. State Insurance Co., 20 Or. 547, 26 P. 840 (1891), the insurance company denied the authority of an agent to make a preliminary oral contract for fire insurance. The court stated:

> "An insurance company which clothes a person with authority to hold himself out to the community as its local agent with authority to effect insurance, is bound by the acts of the agent, within the apparent scope of his authority. This authority need not be expressed, but may be implied from circumstances, and may thus exist as to third parties, although not as between the agent and the company." (20 Or. at 561)

Mayflower principally relies on the case of Parker v. Title and Trust Company, 233 F. (2d) 505 (CA 9, 1956) in support of its contention that it had no duty to exercise diligence or due care. The Parker case was tried to the court without a jury and the court made strong findings of fraud. This court held that Parker had "laid a trap" for the title company and further held "Surely a person thus led into a trap owes no duty to the one who did the trapping" (233 F. (2d) at 510). This case is in no way similar to the Parker case.

The Parker case also relied on Howard v. Tettelbaum, 61 Or. 144, 120 P. 373 (1912) and Wolfgang v. Henry Thiele Catering Co., 128 Or. 433, 275 P. 33 (1929). Both of these Oregon cases involved suits for reformation of written instruments and the cases were decided on equitable principles regarding relief from mistake.

The Howard case, supra, pointed out that the defendant was not harmed in the least by the negligence of the plaintiff (61 Or. at 149). The Wolfgang case, supra, actually held that the degree of negligence which will preclude a party from equitable relief depends on the circumstances. The court stated that no bona fide purchaser had become interested in the property and that reformation of the contract would not adversely affect the interests of anyone whose interest should be held immune (128 Or. at 447-448). The court further stated:

> "It is to be observed from the authorities previously reviewed, that at the present time a considerable degree of carelessness will be found excusable if it has not adversely affected some other person whose interest should not be prejudiced by a reformation of the document. Upon the other hand, if the reformation would affect a bona fide purchaser, even a slight degree of negligence will not be excused. It will also be observed, that this court, in harmony with the test written by Pomeroy, has held, that as a general rule the facts of each case will in a large measure, determine the degree of care which the party should have exercised; indeed, the modern authorities give us only one general statement of the standard degree of care; it is, that the laxness must not have violated a positive legal duty owed by the complaining party." (128 Or. at 452)

The rights of innocent third parties, the Gilmonts, are certainly involved in this case. It is also clear that McKinzie is being directly harmed. It is impossible for Mayflower to restore the status quo. McKinzie cannot now obtain insurance which would protect him against liability for the accident of June 8, 1957.

The duty of an insurance company to use due care depends upon the circumstances. In Adriaenssens v. Allstate Insurance Company, 258 F. (2d) 888 (CA 10, 1958), cited by Mayflower, the court stated:

> "The duty to investigate where notice of a fact or facts indicate misrepresentation is a relative one depending upon the particular situation." (258 F. (2d) at 891)

The Oregon Supreme Court has also held that when a person may discover fraud by the use of due diligence in investigating the statements alleged to be false and is afforded ample opportunity to do so but fails to avail himself of it, he cannot avoid his contract on the ground of fraud. Elliott v. Mork, 144 Or. 246, 24 P. (2d) 1036 (1933).

We believe that the correct rule is stated in Williams v. Pacific States Fire Ins. Co., 120 Or. 1, 251 P. 258 (1926) as follows:

> "The insurer will not be permitted to avoid the policy by taking advantage of any misstatement, misrepresentation or concealment, of a fact material to the risk, which is due to the mistake, fraud, *negligence or other fault of its agent* and not to fraud or bad faith on the part of the insured:" (Emphasis added) (120 Or. at 10)

The position of the insurance company in this case is basically inequitable. The loss has occurred; the rights of third parties have intervened; and it is impossible to restore the status quo. Under such circumstances Mayflower should not now be allowed to say that it had "no duty".

## CONCLUSION

Mayflower's motion for a directed verdict and its motion for a new trial were properly denied. Mayflower had the burden to prove the elements of fraud by clear and convincing evidence. This was a proper question for the jury.

The district court withdrew the affirmative defenses of waiver, estoppel, laches and the question of whether the insurance company had affirmed its insurance contract. The question of negligence was properly submitted to the jury. This case was fairly tried and the jury was properly instructed. The judgment should be affirmed.

Respectfully submitted,

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